IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANIMAL WELFARE INSTITUTE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 03-2006 (EGS/JMF)**
	)	
FELD ENTERTAINMENT, INC.,	)	
	)	
Defendant.	)	
	)	

DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION TO JOIN THE HUMANE SOCIETY OF THE UNITED STATES AS A PARTY PLAINTIFF AND NOTICE OF HEARING

Defendant Feld Entertainment, Inc. ("FEI") hereby moves the Court, pursuant to Federal Rule of Civil Procedure 25(c), for an order formally joining the Humane Society of the United States ("HSUS") as a party plaintiff in the above-entitled action. Alternatively, FEI requests discovery into the relationship between HSUS and plaintiff the Fund for Animals ("FFA"), to establish that HSUS and FFA underwent a *de facto* merger as a result of their January 1, 2005 "combination." FEI further requests that the Court schedule a hearing on these issue should the Court deem it necessary.

A Memorandum of Points and Authorities and exhibits thereto in support of this motion and a proposed order are submitted herewith. Pursuant to Federal Rules of Civil Procedure 25(c), 25(a)(3) and 4(h), FEI served this motion on counsel for HSUS, who is authorized to accept service on HSUS's behalf.

Pursuant to LCvR 7(m), undersigned counsel states that counsel for defendant consulted with counsel for plaintiffs, counsel for Ms. Meyer and Meyer Glitzenstein & Crystal ("MGC"), and counsel for HSUS regarding the relief requested by this motion between November 20th and

22nd and states as follows: Counsel for HSUS and FFA stated that those entities oppose the motion. Counsel for AWI stated that AWI was not currently in a position to state whether it opposes the motion. Counsel for Ms. Meyer and MGC took no position on the motion. Counsel for API/Born Free and counsel for Tom Rider did not respond.

WHEREFORE, premises considered, FEI respectfully requests that its motion be granted.

Dated: November 22, 2013

Respectfully submitted,

/s/ John M. Simpson

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MEMORANDUM IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION TO JOIN THE HUMANE SOCIETY OF THE UNITED STATES AS A PARTY PLAINTIFF AND NOTICE OF HEARING

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EXHIBIT LIST

Ex. Number	**Description**
1	FFA and HSUS Asset Acquisition Agreement (DX 68)
2	HSUS 2012 Annual Report
3	ASPCA 2012 IRS Form 990
4	FFA 2005 IRS Form 990 (Ex. 24 to FEI's Motion to Compel HSUS), (ECF No. 192-24)
5	HSUS 2005 IRS Form 990 (ECF No. 169-8 & 169-9)
6	3-6-08 Evidentiary Hearing Transcript Excerpts (ECF No. 322)
7	FFA 2011 IRS Form 990
8	HSUS 2011 Form 990
9	HSUS and Affiliates 2012 Consolidated Financial Statements
10	Joint HSUS/FFA Press Release (Ex. 2 to FEI's Motion to Compel HSUS), (ECF No. 192-2)
11	FFA Website – *Privacy Policy*
12	Compl., *Strek v. The Humane Soc'y of the U.S.*, No. 12-1610-AA (D. Or.)
13	HSUS Website – *Five Faces of Animal Care* (09-15-11)
14	HSUS Website – Current Docket *ASPCA, The Fund for Animals et al. v. Ringling Brothers et al.* (Circus elephants), (ECF No. 192-4)
15	FFA Rule 30(b)(6) Deposition (Markarian) (6-22-05) (FEI Evidentiary Hearing Ex. 33)
16	Fundraiser Invitation (DX 62)
17	HSUS Payments to WAP (ECF No. 166-14, 166-19, 166-22, 166-15, 166-20, and 166-23)
18	WAP Ledgers of Payments Received for Tom Rider (DX 50)
19	HSUS Check to WAP (8-3-06) (Ex. 49 to FEI's Opp. to Pls. Rule 11 Mot.), (ECF No. 166-39)

Ex. Number	**Description**
20	FFA Board of Directors Meeting Minutes (3-6-08) (Ex. 22 to FEI's Motion to Compel HSUS), (ECF No. 192-22)
21	Nicole Wallace, *Two Animal-Protection Groups Plan to Merge in 2005*, The Chronicle of Philanthropy, Dec. 9, 2004
22	*2004 Raised the 'Bar' for Animal Protection Victories in the Nation's Courts*, PR Newswire US, Dec. 30, 2004
23	Mark Hrywana, *Getting the Message to Lawmakers Gets Expensive: Changing Minds is Costing Millions More These Days*, The Non-Profit Times, Oct. 1, 2006
24	Ben Emmanuel, *More Than Just Dogs and Cats*, Flagpole, Sept. 6, 2006
25	John Hogan, *HSUS Cause is Clear*, Topeka Capital-Journal, Apr. 22, 2008
26	HSUS 2006 IRS Form 990
27	FFA 2004 Annual Report
28	FFA 2007 IRS Form 990
29	HSUS 2005 Consolidated Financial Statements

By contract, Plaintiff The Fund for Animals ("FFA") transferred its interest in this litigation to the Humane Society of the United States ("HSUS") effective January 1, 2005. HSUS therefore became a party to this case and is bound by any judgment entered by the Court against FFA. *See* Fed. R. Civ. P. 25(c). Though this is true even without formal joinder, to efficiently facilitate the last stage of this case, FEI hereby requests that the Court explicitly recognize the legal ramifications of the FFA/HSUS corporate combination – that HSUS is a party plaintiff and as such is jointly and severally liable with the other plaintiffs for FEI's attorneys' fees.

In the alternative, HSUS should be joined under Rule 25(c) pursuant to the *de facto* merger exception to the rule against successor liability. Undisputed facts, many of which already are matters of record in this case, demonstrate that, after the corporate combination of the two entities, only a shell of FFA remains, under the complete control of HSUS. Should the Court find, however, that there are outstanding issues of material fact relevant to the resolution of this issue, FEI requests fact discovery and an evidentiary hearing regarding the corporate combination between FFA and HSUS to establish that HSUS is FFA's successor in interest.

BACKGROUND

FFA was an original plaintiff when this case was first filed on July 11, 2000 as case number 00-641, and remained a plaintiff when it was re-filed on September 26, 2003 as case number 03-2006. ECF No. 1; No. 00-1641, ECF No. 1. While this litigation was ongoing, on November 22, 2004, FFA and HSUS entered into an Asset Acquisition Agreement ("the Contract"), effective January 1, 2005. Under the terms of the Contract, HSUS expressly assumed FFA's liabilities, and in exchange, received essentially all of FFA's assets. DX 68,

attached hereto as Ex. 1, §§ 1.1-1.3.[1] Certain, enumerated assets and liabilities were excluded. FFA's interest in this lawsuit, however, was not one of the excluded assets, and FFA's liability for attorneys' fees was not one of the excluded liabilities. *Id.* The Contract is governed by New York law. *Id.* § 11.9.

This Court entered judgment for FEI on December 30, 2009, ECF No. 558, holding that, though the case had consumed the parties' and the Court's time and resources for nearly a decade, no plaintiff ever had standing to bring the case in the first place. ECF No. 559 at 2, 18-57. This decision was affirmed in its entirety by a unanimous panel of the D.C. Circuit on October 28, 2011. *ASPCA v. Feld Ent., Inc.*, 659 F.3d 13 (D.C. Cir. 2011).

As the prevailing party, FEI was entitled to move to recover the attorneys' fees it was required to incur defending itself in this litigation. The parties agreed to bifurcate the briefing into two phases: entitlement and amount. ECF No. 575. In its motion for entitlement to attorneys' fees, FEI requested, *inter alia*, that, based on the legal effect of the Contract, HSUS be held jointly and severally liable with the plaintiffs. ECF No. 593 at 1, 18. HSUS filed a motion to strike itself from FEI's entitlement motion on the basis that it was not a party to the case. ECF No. 598. On March 29, 2013, the Court found that this case was "groundless and unreasonable from its inception" and held that "attorneys' fees are warranted, jointly and severally against all plaintiffs" under the Endangered Species Act. ECF No. 620 at 3-4.[2] The Court denied FEI's request to hold HSUS jointly and severally liable – without prejudice "to refile at the appropriate time and in an appropriate procedural posture." *Id.* at 49. Accordingly, HSUS's motion was

[1] "DX" refers to an FEI trial exhibit. The Contract was admitted into evidence at the trial of this case without objection. ECF No. 484-2 at p. 16.

[2] The court additionally held plaintiffs' counsel Katherine Meyer and her law firm, Meyer, Glitzenstein & Crystal ("MGC"), jointly and severally liable for sanctions under 28 U.S.C. § 1927 for a portion of FEI's attorneys' fees. ECF No. 620 at 4.

denied as moot. *Id*. at 4, 49-50. Since the Court has ruled that FEI is entitled to recover attorneys' fees, with the "appropriate amount" the only remaining issue, *id.* at 50, it is now clear that the plaintiffs in this case, including FFA, will be subject to a money judgment in favor of FEI. Accordingly, the time is appropriate for formally joining HSUS to this case.

ARGUMENT

I. HSUS IS A PARTY AS A MATTER OF LAW UNDER RULE 25(C) BECAUSE FFA TRANSFERRED ITS INTEREST IN THE LITIGATION TO HSUS AND JOINING HSUS WILL EXPEDITE AND SIMPLIFY THE CASE

An entity to whom an interest in litigation is transferred during the course of the litigation may be joined as a party under Federal Rule of Civil Procedure 25(c). Fed. R. Civ. P. 25(c) ("In case of any transfer of interest," the court may, upon motion, "direct[] the person to whom the interest is transferred to be substituted in the action or joined with the original party … ."); *see also Learning Annex Holdings, LLC v. Rich Global, LLC*, 2011 U.S. Dist. LEXIS 86003, at *9 (S.D.N.Y. Aug. 3, 2011) (joining under Rule 25(c) a party that had assumed the plaintiff's interest in the litigation); *Burka v. Aetna Life Ins. Co.*, 87 F.3d 478, 484 (D.C. Cir. 1996) (joining transferee in interest of property at issue in lawsuit as a defendant under Rule 25(c)).

Because a transferee in interest "is bound by a judgment against its predecessor even if substitution [or joinder] is not effected," *Koehler v. Bank of Berm. Ltd.*, 2002 U.S. Dist. LEXIS 13966, at *7 (S.D.N.Y. July 30, 2002), whether a Rule 25(c) motion should be granted, or is even necessary, is left to the sound discretion of the trial court. *Organic Cow, LLC v. Ctr. for New Eng. Dairy Compact Research*, 335 F.3d 66, 71 (2d Cir. 2003). In exercising that discretion, the "primary consideration" is whether joinder "will expedite and simplify the action." *Learning Annex Holdings, LLC*, 2011 U.S. Dist. LEXIS 86003, at *5. A district court's ruling on a Rule 25(c) motion will only be reversed for abuse of discretion. *Burka*, 87 F.3d at 482.

A. FFA Transferred its Interest in the Litigation to HSUS

"A 'transfer of interest' in a corporate context occurs when one corporation becomes the successor to another by merger **or other acquisition of the interest the original corporate party had in the lawsuit.**" *Luxliner P.L. Export, Co. v. RDI/Luxliner, Inc.*, 13 F.3d 69, 71 (3d Cir. 1993) (emphasis added).[3] Although it is clear that the transaction between FFA and HSUS was a *de facto* merger, it is not necessary to delve into that issue. **HSUS acquired FFA's interest in the lawsuit by contracting for it**. Consequently, HSUS became a party to this case through the plain language of the Contract between it and FFA.

1. FFA's Interest in This Litigation Was An "Asset" That Was Transferred to HSUS

HSUS did not contract to acquire just a few of FFA's assets. According to the Contract, HSUS acquired everything FFA had, except for a few, explicitly excluded assets.

> In consideration of the assumption of the Fund's liabilities … ***HSUS shall purchase, acquire*** directly or indirectly, and accept from the Fund … ***all of its assets***, including but not limited to ***all of its real and personal property***, tangible and intangible, ***of any type or kind*** wheresoever situated [excluding assets defined in Section 1.2].

Ex. 1 § 1.1 (emphasis added). In other words, FFA and HSUS structured the Contract so that the default was that if FFA had it, HSUS got it. The only assets that were not transferred are those specifically set out in Section 1.2 ("Excluded Assets") of the Contract. FFA's interest in this on-going litigation was not one of the excluded assets. *Id.* § 1.2.[4] Because FFA's interest in this

[3] Successor liability is a matter of state law. *LiButti v. U.S.*, 178 F.3d 114, 124 (2d Cir. 1999). Here, the Contract is governed by the law of New York. Ex. 1 § 11.9.

[4] Section 1.2 states that "the following Fund assets (the "Excluded Assets") are expressly excluded from the acquisition and sale contemplated hereby, and, as such, are not included in the Assets:

(a) cash in the amount of $250,000;

(b) books and records relating to its incorporation and qualification to do business as a foreign corporation in those jurisdictions where it is qualified, and minutes of proceedings of its members and directors, provided that copies of such books and records are provided to HSUS by Closing;

(c) records, whether in its possession or in the possession of its auditors, relating to preparation and certification of financial statements;

litigation is not among the excluded assets, it was transferred to HSUS. *Id.* § 1.1 (HSUS assumes all assets of FFA other than explicit exclusions in section 1.2); § 1.2 (list of excluded assets, not including FFA's interest in this litigation). Accordingly, HSUS is a "transferee in interest" pursuant to Rule 25(c). *See Negron-Almeda v. Santiago*, 579 F.3d 45, 53 (1st Cir. 2009) (substituting non-party as a defendant under Rule 25(c) because the previous defendant had "conveyed and transferred" to that entity "all assets of every type, including copyrights, agreements, liabilities, licenses and permits" pursuant to a legislative act).

If that were not clear enough, the Contract goes on to provide a non-exhaustive list of examples of the assets that were transferred. That list specifically includes all "**causes of action**." Ex. 1 § 1.1(h) (emphasis added).[5] It is thus indisputable that FFA's interest in this lawsuit – its interest in the ESA "cause of action" – was transferred to HSUS, making HSUS a "transferee in interest" to this litigation. *See Learning Annex Holdings, LLC*, 2011 U.S. Dist. LEXIS 86003 at *3 (granting Rule 25(c) motion to join an LP as a party plaintiff where the LP and an LLC entered into an "asset contribution agreement" pursuant to which the LP assumed ownership of "all [the LLC]'s claims, causes of action and other legal rights and remedies"); *Taberna Capital Mgmt., LLC v. Jaggi*, 2010 U.S. Dist. LEXIS 35347, at *10-11 (S.D.N.Y. Apr.

(d) all rights of the Fund under this Agreement and agreements related hereto;
(e) the personal property of officers, directors, and employees of Fund, whether in their individual or a fiduciary capacity, which may on the Closing Date be stored or located at an office or other facility of Fund;
(f) the right to receive mail and other communications addressed to Fund relating to any of the Excluded Assets; and
(g) title to and other real property interests in the Fund's unimproved property in Colebrook, Connecticut and in the Fund's facilities in Murchison, Texas (the Black Beauty Ranch), and at Ramona, California (the Wildlife Rehabilitation Center)."

Ex. 1 § 1.2.

[5] The list also includes: all land and buildings; all intangible assets and intellectual property; all cash; all rights under contracts; the right to receive FFA mail; all donor lists; all creative materials; all rights to receive legacies; all goodwill; all interest in phone and internet directories; and all rights to use and control all of the Assets. Ex. 1 § 1.1(a)-(l).

9, 2010) (joining as a plaintiff the entity to whom the previous plaintiff had transferred "all rights, claims, [and] causes of action" pursuant to a settlement agreement); *see also Barrows v. Resolution Trust Corp.*, 1994 U.S. App. LEXIS 32038, at *5 (1st Cir. Nov. 15, 1994) (holding that express transfer of "all rights, titles, powers, and privileges" from a defendant constituted a transfer in interest for purposes of Rule 25(c)).

2. <u>FFA's Liability Resulting From This Litigation Was Transferred to HSUS</u>

HSUS's status as transferee in interest is further solidified by the fact that HSUS expressly contracted to assume all of FFA's liabilities, excluding only those related to three pieces of real property not at issue here.

> HSUS shall assume, defend, discharge, and perform as and when due, ***all lawful liabilities and obligations*** of Fund (the 'Assumed Liabilities') of whatever type or kind, including ***without limitation*** contingent liabilities whether known or unknown and whether asserted or unasserted … .

Ex. 1 § 1.3 (emphasis added); § 1.4 (list of excluded liabilities; only those related to three pieces of real property). Accordingly, by the terms of the Contract, HSUS is liable for any judgment in this case against FFA. *See, e.g., Am. Std., Inc. v. OakFabco, Inc.*, 927 N.E.2d 1056, 1057 (N.Y. 2010) (holding that acquiring company contractually assumed the selling company's liabilities where it agreed to purchase "substantially all the assets of Seller," subject to "all debts, liabilities, and obligations connected with or attributable to such business and operations."). HSUS cannot now escape the consequences of its decision. "[I]f the purchasing party contractually assumes liabilities from the seller, then it has chosen to be liable." John M. Matheson, *Successor Liability*, 96 Minn. L. Rev. 371, 385 (2011).

One of the defining features of an asset sale, that distinguishes it from a formal merger, is that "the purchasing corporation can presumptively pick and choose what it wants to take." Matheson, *Successor Liability*, 96 Minn. L. Rev. at 384. Whereas when two parties merge, the

resulting entity automatically "becomes legally responsible for all liabilities and obligations of each of the constituent organizations,"[6] in an asset sale "the acquiring entity can selectively choose which assets and which, if any, liabilities it wants to acquire." *Id*. at 379-80. In this case, it is a distinction without a difference, because by the express and unambiguous terms of the Contract, HSUS assumed all of FFA's assets and all of FFA's liabilities, with limited exclusions (this lawsuit not among them). Hence, clinging to the position that the "combination" was an asset sale, not a merger, does HSUS no good. HSUS "picked and chose" everything it wanted – including FFA's interest in this case. Furthermore, the interest that HSUS acquired from FFA continued to be represented, not only by then-existing outside counsel (MGC), but also by two HSUS employees – Jonathan Lovvorn and Kimberly Ockene – former MGC partners who became employees of HSUS, remained as counsel of record for all plaintiffs until June 2012, and who were consulted on the strategic decisions in this case. Docket Sheet; ECF No. 599-36, ¶¶ 4, 6, 8; ECF No. 599-37, ¶¶ 5, 19; Tr. of Hearing at 145:12 (05-30-08) (ECF No. 603-2); ECF No. 601.

B. *Joining HSUS as a Plaintiff will Expedite and Simplify Resolution of this Case and Serve the Purposes of Rule 25*

HSUS is bound by any judgment in this case against FFA, whether this motion is granted or not, because a transferee is legally bound by a judgment against the transferor, even without Rule 25(c) joinder. *Koehler*, 2002 U.S. Dist. LEXIS 13966, at *6-7 (Once a transfer of interest has occurred, the "successor in interest is bound by a judgment against its predecessor even if substitution is not effected.") (citing *LiButti*, 178 F.3d at 124); *Bary-Ayal v. Time Warner Cable Inc.*, 2006 U.S. Dist. LEXIS 75972, at *2 n.1 (S.D.N.Y. Oct. 16, 2006) (Pursuant to Rule 25(c), "the judgment will be binding on [the] successor in interest even [if] he is not named.") (internal

[6] *See also* N.Y. Not-for-Profit-Corp. Law § 905(b)(3) ("The surviving or consolidated corporation shall assume and be liable for all the liabilities, obligations and penalties of each of the constituent corporations.").

quote omitted). Despite formal joinder not being strictly necessary, Rule 25(c) motions should be granted where joinder "will expedite and simplify the action." *Learning Annex Holdings, LLC*, 2011 U.S. Dist. LEXIS 86003, at *5 (granting Rule 25(c) motion to join additional plaintiff because it would be "easier to satisfy th[e] judgment with the suit's rightful owner listed as a party."); *see also Maysonet-Robles v. Cabrero*, 323 F.3d 43, 49 (1st Cir. 2003) (A Rule 25(c) decision "implements a discretionary determination by the trial court to facilitate the conduct of the litigation… ."); *Travelers Ins. Co. v. Broadway W. St. Assocs.*, 164 F.R.D. 154, 164 (S.D.N.Y. 1995) (granting Rule 25(c) motion to substitute real parties in interest because it would "facilitate th[e] action."); *FDIC v. Tisch*, 89 F.R.D. 446, 448 (E.D.N.Y. 1981) ("The decision to order substitution or joinder is to be made by considering how the conduct of the lawsuit will be most facilitated"; granting motion to join under Rule 25(c)).

Joining HSUS now will expedite and simplify the action. The Court already has held that the ESA Action plaintiffs are jointly and severally liable for the fees FEI was required to expend defending itself. ECF No. 620 at 3-4. That there will be a money judgment against FFA is inevitable. To the extent that plaintiffs intend to argue that the Court should consider the plaintiffs' ability to pay in setting the amount of FEI's fee award, the ***full picture*** – including HSUS's ability to pay – should be before the Court. Without joining HSUS now, the Court will not have before it an accurate representation of the resources that are, and should be, available to satisfy FEI's judgment.[7] Further, it will be simpler and more efficient for FEI to execute on the

[7] For example, the existing plaintiffs have characterized the potential fee award that their conduct precipitated as "life-threatening," ECF No. 621 at 4, notwithstanding their own aggregate net assets. *See* ECF No. 635 at 55. But this is a particularly misleading statement when the wealth of HSUS is considered, as it should be. HSUS's Annual Report (available on its website) shows total net assets of $215,323,483, which is an increase of nearly $15 million, or 7.4% over the previous year. Ex. 2 (HSUS 2012 Annual Report) at 32. The purported "life-threatening" nature of the relief that FEI seeks is also belied by the fact that former plaintiff ASPCA made a single, lump-sum cash payment of $9.3 million in December of 2012 to FEI to settle FEI's claims against it, ECF No. 616-1, but ASPCA still finished 2012 with an ***increase*** in net assets, from $182,911,579 at the beginning of the year, to $185,451,137 at year end. Ex. 3 (ASPCA 2012 IRS Form 990) at 1. Courts have found that contested Rule 25(c) motions should be

forthcoming judgment if all of the liable parties are included in that judgment. *See Greater Potater Harborplace, Inc. v. Jenkins*, 1991 U.S. App. LEXIS 11015, at *12 (4th Cir. May 31, 1991) ("[I]t is well established that under Rule 25(c) a court can substitute [or join] parties, even after judgment, where substitution [or joinder] of a party is necessary for enforcement of the judgment.").

Moreover, joining HSUS satisfies the purpose of Rule 25 – "to prevent [] assets, which are subject to litigation, [from] be[ing] transferred to a third party, allowing [the] defendant to sabotage plaintiffs' efforts of reaching the assets should liability on defendant attach." *Maldonado v. Valsyn S.A.*, 434 F. Supp. 2d 90, 91-92 (D.P.R. 2006). Declining to join HSUS would allow FFA and HSUS to escape liability for their litigation misconduct by allowing FFA to contract away all of its assets (over $18 million dollars' worth)[8] to HSUS and then shielding them from judgment by arguing that HSUS is not a party to this case. Courts have joined parties under Rule 25 to avoid such injustice. *See, e.g., Minn. Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1262, 1264 (Fed. Cir. 1985) (joining new corporation to which all of the previous defendant's assets were transferred during the litigation, "because it succeeded to the assets from which [the plaintiff] may satisfy its judgment."); *Nazario-Lugo v. Caribevision Holdings, Inc.*, 2013 U.S. Dist. LEXIS 24121, at *7-8 (D.P.R. Feb. 19, 2013) (joining as party defendants the companies to which the original party transferred all of its assets because the joined parties "succeeded to the assets from which [Plaintiff] could execute its judgment"); *see also Panther*

treated like motions for summary judgment, and as such, that materials beyond the pleadings may be considered. *Beane v. Beane,* 2011 U.S. Dist. LEXIS 8872, at *18 (D.N.H. Jan. 24, 2011) (citing *Luxliner*, 13 F.3d at 72).

[8] The assets that FFA transferred to HSUS were valued at $18,418,663. ECF No. 192-24, attached here as Ex. 4 (FFA 2005 IRS Form 990), at p. 21 ("Transfer beginning net assets to HSUS – 18,418,663") and p. 43 ("Effective January 1, 2005, an asset acquisition agreement was executed between The Fund for Animals (Fund) and The Humane Society of the United States (Society) … whereby the Fund transferred assets totaling $18,418,663 to the Society."); ECF No. 169-8 & 169-9, attached hereto as Ex. 5 (HSUS 2005 IRS Form 990), at 20 ("Net Assets Acquired from FFA: $18,418,663").

Pumps & Equip. Co, Inc. v. Hydrocraft, Inc., 566 F.2d 8, 27-28 (7th Cir. 1977) (holding that person who made defendant judgment-proof by transferring its assets to another company that he owned, rendering the defendant "a worthless shell of a corporation," must be substituted as a defendant under Rule 25(c)).

C. Because the Contract Transferred FFA's Interest to HSUS as a Matter of Law, the Court Need Not Conduct an Evidentiary Hearing

In ruling on a Rule 25(c) motion, the Court need not hold an evidentiary hearing unless there is a genuine issue of material fact. *Software Freedom Conservancy, Inc. v. Best Buy Co.*, 2010 U.S. Dist. LEXIS 125426, at *11 (S.D.N.Y. Nov. 29, 2010); *Luxliner*, 13 F.3d at 72-73. Where, as here, however, the "moving party is entitled to [joinder or substitution] as a matter of law," then "the court should grant the [Rule 25] motion." *Luxliner*, 13 F.3d at 72-73.

In a case that turns on the meaning of a contract, "where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law … ." *PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996). Here, HSUS succeeded to FFA's interest in this litigation as a matter of law by virtue of the unambiguous terms of the Contract. Ex. 1 § 1.1-1.3 (HSUS assumed all of FFA's assets and liabilities except for inapplicable enumerated exclusions). The face of the Contract is clear. HSUS bought FFA's interest in this case. If there was any ambiguity about whether FFA's interest in litigation was included in its transfer of "all assets," that ambiguity is eliminated by Section 1.1(h), which explicitly lists FFA's "causes of action" as assets that were transferred. Ex. 1 § 1.1(h). Further, HSUS also contracted to "assume" "all lawful liabilities" of FFA, "of whatever type or kind." Ex. 1 § 1.3. Here, as in *Am. Std.*, "nothing in the nature of the transaction suggests that the parties intended [the buyer], which got all the assets, to escape any of the related obligations." 927 N.E. 2d at 1057.

It is undisputed that the Contract makes HSUS responsible for a judgment against FFA in this case. Critically, in the briefing on its previous motion to strike, HSUS did not deny that the Contract makes it liable for a judgment against FFA. Instead, it argued merely that joinder was premature – that the Court should not join it as a party before a Rule 25(c) motion was filed. ECF No. 604 at 3-5.[9] With the filing of the instant motion, that argument is now moot. Hence, HSUS is bound as a matter of law. Nothing further – discovery or an evidentiary hearing – is required.

II. ALTERNATIVELY, HSUS SHOULD BE JOINED UNDER RULE 25(c) PURSUANT TO THE DE FACTO MERGER DOCTRINE

As a general rule, a company that acquires the assets of another does not take on the liabilities of the acquired company. There are, however, four successor liability exceptions pursuant to which a party may be joined under Rule 25(c). *AT&S Transp., LLC v. Odyssey Logistics & Tech. Corp.*, 22 A.D.3d 750, 752 (N.Y. App. Div. 2005). Under New York law[10], the purchasing company is a successor in interest if any <u>one</u> of the following conditions is met:

(1) it expressly or impliedly assumed the seller's liabilities;

(2) there was a *de facto* merger of the two companies;

(3) the purchasing corporation was a mere continuation of the selling corporation; or

(4) the transaction was entered into fraudulently in order to escape such obligations. *Marenyi v. Packard Press Corp.*, 1994 U.S. Dist. LEXIS 14190, at *19 (S.D.N.Y. June 9, 1994); *R.C.M. Exec. Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635-36 (S.D.N.Y. 1995).

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[9] HSUS's curious argument that the Contract could potentially be voidable due to FFA's fraud, ECF No. 598 at 10 n.4, further solidifies the point that HSUS knows that absent nullification of the Contract, HSUS is liable for a judgment against FFA.

[10] The Contract effectuating the FFA/HSUS "corporate combination" is governed by New York law. Ex. 1 § 11.9. New York successor liability law, however, recognizes the same successor liability exceptions as traditional common law. *New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 209 (2d Cir. 2006).

As established above in Section I(A)(2), the first exception is met because HSUS expressly assumed FFA's liabilities. Ex. 1 § 1.3. Because any of the exceptions alone defeats the presumption against successor liability, this can and should be the end of the matter.

Should the Court look beyond the Contract itself, however, HSUS also should be joined because its combination with FFA constituted a *de facto* merger. Based upon what FEI already knows, the facts are undisputed that there was a *de facto* merger between HSUS and FFA. However, if the Court finds that any issues of material fact remain, FEI requests discovery and an evidentiary hearing into the relationship between HSUS and FFA.

A. The 2005 Combination was a De Facto Merger[11]

"A *de facto* merger occurs where one corporation is absorbed by another, but without compliance with the statutory requirements for a merger." *Arnold Graphics Indus., Inc. v. Independent Agent Ctr., Inc.*, 775 F.2d 38, 42 (2d Cir. 1985). The "hallmarks" of a *de facto* merger include: "(1) continuity of ownership; (2) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (3) assumption of the purchaser of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and (4) continuity of management, personnel, physical location, assets, and general business operation." *Nat'l Serv. Indus., Inc.*, 460 F.3d at 209 (citations omitted). Not all of these factors need be established to find a *de facto* merger. *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (N.Y. App. Div. 2001); *Marenyi*, 1994 U.S. Dist. LEXIS 14190, at *35 (citing *Diaz v. South Bend Leather, Inc.*, 707 F. Supp. 97, 100 (E.D.N.Y. 1989)). The first factor,

[11] This Court already has found, in ruling on HSUS's motion to dismiss FEI's First Amended Complaint in the RICO Action (No. 07-1532), that FEI stated sufficient facts of a *de facto* merger between HSUS and FFA to survive a motion to dismiss. No. 07-1532, 07-09-12 Mem. Op., ECF No. 90, at 57-64. The Court can take judicial notice of the record in the RICO Action. *See, e.g.*, *Dupree v. Jefferson*, 666 F.2d 606, 608 n.1 (D.C. Cir. 1981). The facts stated in the RICO First Amended Complaint about the FFA/HSUS transaction are undisputed and, for the most part, also are matters of record in the instant case.

continuity of ownership, is not applicable to non-profit corporations, so whether the combination constituted a *de facto* merger depends on factors 2, 3, and 4.[12]

Instead of mechanically applying the *de facto* merger factors, courts focus on the purpose of the doctrine – "that a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities in order to ensure that a source remains to pay for the victim's injuries." *Nettis v. Levitt*, 241 F.3d 186, 194 (2d Cir. 2001) (overruled on other grounds, 460 F.3d 215 (2d Cir. 2008)) (citation omitted). In evaluating this, courts analyze the factors "in a flexible manner that disregards mere questions of form and asks whether, in substance, 'it was the intent of [the successor] to absorb and continue the operation of [the predecessor].'" *Id.* (citation omitted). Here, it is clear that the FFA/HSUS "corporate combination" constituted a *de facto* merger under New York law.

1. Only a Shell of FFA Remains

For the second factor to weigh in favor of a *de facto* merger finding, FFA need not have completely dissolved. "So long as the acquired corporation is shorn of its assets and has become, in essence, a shell, legal dissolution is not necessary before a finding of a *de facto* merger will be made." *Fitzgerald*, 286 A.D.2d at 575.

Here, all that remains of FFA is a "shell." It sold all of its assets to HSUS, with a few, very limited exceptions. Ex. 1 §§ 1.1, 1.2. Everything else went to HSUS, including, but not limited to: land; buildings; all intangible assets, including trademarks and copyrights; cash and securities; rights under contracts; the right to receive FFA mail; donor lists; creative materials; causes of action; goodwill; and phone numbers, email addresses, websites, and listings for FFA

[12] HSUS is described, in the Contract, as a Delaware "nonstock corporation." Ex. 1 at 1. FFA is described in the Contract as a "New York Not-for-Profit Corporation," *id.*, an entity that, under New York law, may have members but does not issue stock. *See* N.Y. Not-for-Profit Corp. Law § 101 *et seq.* *See also* No. 07-1532, 07-09-12 Mem. Op., ECF No. 90, at 62 ("The first element, continuity of ownership, is not applicable to non-profit corporations.").

in telephone books and other directories. *Id*. § 1.1. HSUS got ownership of all equipment in FFA offices, including filing cabinets and computers. Ex. 6 (excerpts of ECF No. 322, Tr. of Hearing (03-06-08)) at 54 (Markarian).

As part of the "combination," FFA's voting members and board members had to resign. Ex. 1 § 4.1(j) ("At or prior to the Closing, … the Fund shall … (j) prepare and have executed letters of resignation for all current voting members of the Fund and all current members of the Fund's board of directors … ."). They have been replaced by members designated by HSUS's board of directors. Ex. 1 § 4.1(i)(C) (FFA shall amend its By-Laws to provide "that the voting members of the Fund shall consist of the persons designated by a vote of the HSUS's board of directors"). In their joint press release announcing the combination, FFA and HSUS stated that the transaction resulted in "[b]oth organizations' boards of directors … combin[ing] to operate as one … ." ECF No. 192-2, attached as Ex. 10 hereto (Press Release, FFA/HSUS, "The HSUS and the Fund for Animals Join Forces" (Nov. 22, 2004)) at 2.

Before the "combination" FFA had six offices. Ex. 6 at 55 (Markarian). Afterwards, FFA had only one office in New York City. *Id*. Even as to that one office, however, HSUS leased and operated it until that lease expired. Ex. 1 § 1.5(c) ("HSUS will continue to lease and operate … the Fund's office at 200 West 57th Street, New York, NY until the expiration of the term of the present lease therefore on December 31, 2007 … .").

FFA no longer gets to keep the donations it receives. All such "donations" are to be "immediately turned over to HSUS." Ex. 1 § 10.6.

Epitomizing the fact that FFA is no more than a "shell," **FFA's President**[13] admitted under oath that he only spends about **one hour per week** on FFA matters (for which he uses a computer owned by HSUS and an HSUS email address). Ex. 6 at 51; 54-55 (Markarian). And HSUS pays his salary as "FFA President." *Id*. at 50.

2. HSUS Assumed FFA's Liabilities

This factor is clearly satisfied. As established above, HSUS explicitly assumed FFA's liabilities pursuant to the Contract. Ex. 1 § 1.3.

3. HSUS Dominates the Management, Location, Assets, and General Business Operation of FFA, Including its Litigation

a. HSUS/FFA Relationship Generally

HSUS's management controls FFA's management. The "control and governance" of FFA was explicitly transferred in the Contract. Ex. 1 § 7.2 (at Closing the assets shall be transferred "along with the transfer of control and governance of the Fund to the HSUS … ."). And that transfer has been completed. Ex. 4 (FFA 2005 IRS Form 990), at ECF p. 43 ("the Fund's Board members were assumed into the Society's Board of Director's, and the Society took control of the Fund's Board and voting membership."); Ex. 7 (FFA 2011 IRS Form 990) at p. 35 ("Members of the Fund for Animals' governing body are designated by the Board of … the HSUS").

HSUS and FFA have both represented in their tax filings that HSUS "controls" FFA. Ex. 8 (HSUS 2011 IRS Form 990) at p. 132 (listing HSUS as the "direct controlling entity" of FFA); Ex. 28 (FFA 2007 IRS Form 990) at 33-35 ("Relationship between organizations: controlled by HSUS"). HSUS claims that it "ensures that its controlled affiliated organizations' activities are

[13] Though Mr. Markarian retains his title as FFA President, he considers himself to be employed by HSUS. Ex. 6 at 50 ("Q: Mr. Markarian, are you employed? A: Yes. Q: By whom? A: By the Humane Society of the United States.").

consistent with its own primarily through the use of overlapping personnel on boards and executive staff." Ex. 8 (HSUS 2011 IRS Form 990) at p. 130 (emphasis added); *see also* Ex. 29 (HSUS 2005 Consolidated Financial Statements) at 8 ("The accompanying consolidated financial statements include the ***assets, liabilities, net assets*** and activities of the Society's financially ***interrelated organizations that are controlled by the management of the Society***. The interrelated organizations are: … the Fund for Animals.) (emphasis added).[14]

Indeed, FFA's compensated officers are all HSUS employees, paid by HSUS. *Compare* Ex. 7 (FFA 2011 IRS Form 990) at p. 31 (officers Markarian, Pacelle, and Waite, III all receive compensation from "related organization") *with* Ex. 8 (HSUS 2011 IRS Form 990) at p. 82 (disclosing compensation paid to Markarian, Pacelle, and Waite, III).

It is not just management, but all personnel, that overlap. Michael Markarian, FFA President/HSUS Chief Program and Policy Officer, admitted under oath that after the combination, FFA had "*no* paid staff of its own" and that HSUS employs and pays *all* people working for FFA. Ex. 6 at 56-58 (emphasis added); *see also* Ex. 1 § 1.5(b) (HSUS offered employment to all of FFA's employees as part of the Contract). This includes Mr. Markarian, FFA's President, who is paid by HSUS. Ex. 6 at 50 (Markarian).

As to "location," the base of the "combined organization" is in Washington, DC. Ex. 10 (combined FFA/HSUS Press Release) at 3. While FFA technically maintains a New York address, this location is leased and operated by HSUS. Ex. 1 § 1.5(c). And, as discussed

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[14] Since the "combination," HSUS has prepared and submitted to various regulatory authorities "Consolidated Financial Statements" for it and its "affiliates," including FFA, in which it refers to them jointly as "the Society" and as a single "not-for-profit organization." *See, e.g.*, Ex. 9 (HSUS and Affiliates 2012 Consolidated Financial Statements), at 9. FFA has also referred to FFA and HSUS as a single "animal protection organization." Ex. 27 (FFA 2004 Annual Report) at 2 ("Our union has formed the world's largest ***animal protection organization*** … .") (emphasis added). The 2005 Consolidated Financial Statements discussed the "combination," which HSUS claimed resulted in "establishment of common Board control and economic interest," such that the combined financial statement "reflect[s] consolidation of the assets, liabilities, net assets and activities of the Fund." Ex. 29 (HSUS 2005 Consolidated Financial Statements) at 8.

extensively, FFA and HSUS have a near complete overlap of assets. Ex. 1 § 1.1 (HSUS acquired "all of [FFA]'s assets, including but not limited to all of its real and personal property, tangible and intangible, of any type or kind and wheresoever situated").

Given HSUS's complete domination of FFA's management, personnel, and assets, it is a natural consequence that it is responsible for the "general business operation" of FFA. *See also* Ex. 6 at 57-58 (Markarian) (HSUS employees perform FFA fundraising, public relations, and legal functions). Part of the organizations' business is litigation. FFA and HSUS have represented in their own pleadings in multiple cases filed in this district that they have "combined operations" and "now pursue their adjoining programs jointly." Compl., *Humane Soc'y of the U.S. et al. v. Johanns*[15], ¶ 11 ("On January 1, 2005, The Fund and the Humane Society of the United States ***combined operations*** and now ***pursue their adjoining programs jointly***.") (emphasis added); Compl., *Fund for Animals v. Norton*,[16] ¶ 4 ("On January 1, 2005, the Fund and The Humane Society of the United States … ***combined***, and now ***pursue their adjoining programs jointly***.") (emphasis added); Compl., *ASPCA et al. v. U.S. Dep't of Agriculture et al.*[17], ¶ 5 ("On January 1, 2005, The Fund and The Humane Society of the United States ***combined***, and now ***pursue their advocacy programs jointly***.") (emphasis added); Compl., *Defenders of Wildlife, et al. v. Norton*[18], ¶ 6 ("On January 1, 2005, The Fund and the Humane Society of the United States … ***combined***, and now ***pursue their adjoining programs jointly***.") (emphasis added).

[15] No. 06-265 (D.D.C.) (KCC).

[16] No. 05-777 (D.D.C.) (EGS).

[17] No. 05-840 (D.D.C.) (EGS).

[18] No. 06-180 (D.D.C.) (HHK).

Demonstrating their near complete overlap, FFA and HSUS have even referred to themselves as "FFA/HSUS" on their own websites **and in filings with the IRS**. Ex. 11 (FFA website listing "FFA/HSUS Animal Centers"[19]); Ex. 13 (HSUS website describing the organizations as "The Humane Society of the United States / The Fund for Animals"); Ex. 5 (HSUS 2005 IRS Form 990) at 76 (referring to "HSUS FFA" when recording "other revenue on books but not on return"); Ex. 26 (HSUS 2006 IRS Form 990) at 81 (referring to "HSUS FFA" when recording "other revenues included in schedule").

If all of the above were not compelling enough to demonstrate a *de facto* merger, the highest ranking officers of **HSUS and FFA themselves have described the combination as a "merger,"** including in the very press release that announced the combination.[20] Ex. 10 at 1 (combined HSUS/FFA press release stating that "the ***merger*** will formally occur on January 1, 2005.") (emphasis added). And this was not a one-time occurrence. HSUS and FFA have referred to their combination as a "merger" multiple times, both internally and publicly. ECF No. 192-22, attached hereto as Ex. 20 at 4 (FFA board minutes noting Michael Markarian's "[t]wo year review of FFA & HSUS since ***merger***") (emphasis added); Ex. 21 (Nicole Wallace, *Two Animal-Protection Groups Plan to Merge in 2005*, The Chronicle of Philanthropy, Dec. 9, 2004) (quoting HSUS CEO Pacelle as stating "[t]he ***decision to merge*** was not driven by financial necessity, but by a recognition that the organizations could accomplish more together than they could separately.") (emphasis added); *Id.* (quoting FFA President Michael Markarian

[19] HSUS runs the show, even at the "FFA/HSUS Animal Care Sanctuaries." When an employee of one of those sanctuaries, the Duchess Sanctuary for horses, was terminated, she sued HSUS alone. Ex. 12 (Compl., *Strek v. The Humane Soc'y of the U.S.*, No. 12-1610-AA (D. Or. July 7, 2012)). She identified HSUS (not FFA, or FFA/HSUS) as her employer. *Id.* at 3 ¶ 2. There is no reference to FFA in the complaint.

[20] Use of the term "merger" in the press release was particularly significant in light of the Contract provision that no press release about the "combination" be issued without high-level HSUS and FFA review and approval. Ex. 1 § 10.3 ("No press release related to this Agreement … shall be issued … without the joint approval of HSUS and Fund, given through their respective presidents.").

as stating that he "sees the ***merger*** as a way to 'level the playing field.'") (emphasis added). Ex. 22 (HSUS Press Release: *2004 Raised the 'Bar' for Animal Protection Victories in the Nation's Courts*, PR Newswire US, Dec. 30, 2004) ("The Humane Society of the United States (HSUS) and the Fund for Animals, ***which plan to merge on January 1st*** and launch a new Animal Protection Litigation section, have just published an in-depth article about this year's numerous legal victories for animals, available on the HSUS's web site"); Ex. 23 (Mark Hrywana, *Getting the Message to Lawmakers Gets Expensive: Changing Minds is Costing Millions More These Days*, The Non-Profit Times, Oct. 1, 2006, at 2) (quoting HSUS CEO Pacelle, referring to mergers with FFA and others, as stating that mergers "make us bigger and stronger in general, to influence public and corporate policy more significantly.") (emphasis added); Ex. 24 (Ben Emmanuel, *More Than Just Dogs and Cats*, Flagpole, Sept. 6, 2006, at 2) (quoting HSUS CEO Pacelle as stating that "***we merged with [FFA] on January 1, 2005***."); Ex. 25 John Hogan, *HSUS Cause is Clear*, Topeka Capital-Journal, Apr. 22, 2008, at 2) (Quoting HSUS CEO Pacelle as stating "the ***merger***" gave HSUS/FFA a "combined annual budget of $96 million.") (emphasis added).[21]

Any argument that HSUS did not mean what it said must be rejected. This has been tried and failed before. In *Arnold Graphics*, a corporation was substituted for an original defendant under the *de facto* merger doctrine where it had **stated in its own documents** and **government filings** that "it had ***assumed*** [the original defendant]'s ***liabilities***" and "had ***merged***" with the original defendant. 775 F.2d at 43. (emphasis added) The Second Circuit rejected the substituted corporation's argument, in the form of an affidavit from its president, "that [it] really

[21] In addition to repeatedly using the "m" word, FFA and HSUS have also described the transaction as a "union" and stated that Contract resulted in a single, "new entity." Ex. 10 (joint press release) at 1 ("This ***union*** ushers in a whole new era of strengthened activism for animals."; "By combining resources the ***new entity*** will bring unprecedented energy to the battles we take on.") (emphases added)); Ex. 27 (FFA 2004 Annual Report) at 2 ("Our ***union*** has formed the world's largest animal protection organization … .") (emphasis added).

had not intended to effect a merger or to assume [the original defendant]'s liabilities." *Id.* The Second Circuit affirmed the district court's substitution – and found that a hearing was not even necessary on the issue, because "[a]ssertions by a corporate officer simply that the corporation did not really mean the statements it had made repeatedly over the course of several years" are not sufficient to create a "factual dispute" about [a] *de facto* merger." *Id.*

Courts have found *de facto* mergers on similar, if less compelling facts than those present here. For example, in *Greater Potater Harborplace, Inc.*, the Fourth Circuit upheld a district court's joinder of a defendant under Rule 25(c) pursuant to the *de facto* merger doctrine where:

- Owners, officers, and mangers of original defendant became owners, officers and managers of joined defendant;
- The office space of the joined defendant was leased from the original defendant;
- The original defendant "ha[d] little if any assets" remaining;
- The business formerly conducted by the original defendant continued to operate using the same equipment and under the same management; and
- The joined defendant had "the same assets, employees, and management" as the original defendant

1991 U.S. App. LEXIS 11015, at *17-18; *see also Arnold Graphics*, 775 F.2d 40-41 (affirming grant of motion to substitute company as defendant-judgment-debtor on basis of *de facto* merger where the substituted company acquired the assets and liabilities of the original party; had phased out the original party's operations, leaving only one employee; and had represented to the SEC that the assets and liabilities of the original company were merged into the acquiring company).

b. HSUS/FFA Relationship in This Litigation

This case is no exception to FFA and HSUS's joint pursuit of litigation. After the "combination," HSUS touted this case on its website as a case on HSUS's "current docket."

ECF No. 192-4, attached hereto as Ex. 14 (HSUS website on 9/20/2007). That representation continues to be made to this day. *See* http://www.humanesociety.org/news/resources/docket/ringling_brothers_elephants.html (last visited Nov. 22, 2013). True to that representation, HSUS took ownership of this case.

Two of plaintiffs' counsel of record, Ms. Ockene and Mr. Lovvorn, left MGC during the pendency of the case and went in-house at HSUS. In their HSUS positions, they remained as counsel of record for all plaintiffs, until they withdrew in June of 2012. Ms. Ockene has declared under oath that she was "consulted on strategic decisions" concerning the instant case while at HSUS. ECF No. 599-37 (Decl. of Kimberly D. Ockene), ¶ 19. Mr. Lovvorn has declared under oath that one of his HSUS responsibilities "was to serve as in-house counsel for litigation in which the Fund for Animals ('FFA') was a plaintiff because FFA was affiliated with HSUS."). ECF No. 599-36 (Decl. of Jonathan R. Lovvorn), ¶ 8. In that role he claims "was consulted on most major strategy decisions." *Id.* In addition to "consulting," Mr. Lovvorn also prepared FFA President Markarian for his 36(b)(6) deposition in this case. Deposition of Michael Markarian, June 22, 2005, excerpts attached hereto as Ex. 15 ("Markarian Dep.") at 12 ("Q: Did you speak to anyone at the Humane Society of the United States about – about the testimony you were going to give today? A: I had spoken with – with some of our attorneys at the Humane Society. Q: Who were they? A: Jonathan Lovern [*sic*] and Roger Kindler."). He also was responsible for FFA's search for documents in response to the Court's August 23, 2007 discovery order, and "appeared before the Court on May 30, 2008 to answer the Court's questions concerning FFA's compliance" with that order. ECF No. 599-36, ¶ 8. FFA President Markarian identified HSUS employee Mr. Lovvorn not just as a "consultant," but as the manager of the entire litigation for FFA. Ex. 15 (Markarian Dep.) at 30 ("Q: Is there someone from the

litigation department who is in charge of managing this litigation for … the Fund for Animals? A: Yes, Jonathan Lovern [*sic*]. Q: And he's an employee of the Humane Society of the United States, is that right? A: Yes.").[22]

HSUS also was one of the hosts of the July 2005 Los Angeles fundraiser, the proceeds of which were funneled to plaintiff Tom Rider through the Wildlife Advocacy Project ("WAP"). ECF No. 559, Finding of Fact 39. HSUS's CEO, Mr. Pacelle, was scheduled to provide concluding remarks at the fundraiser. DX 62 (fundraiser invitation), attached hereto as Ex. 16, at 2. HSUS also was responsible for six of the Rider payments that were purportedly made by FFA – but which were sent from HSUS employee Lovvorn, on HSUS letterhead, made with HSUS checks, signed by HSUS employees, and drawn on HSUS bank accounts. Ex. 17 hereto (ECF No. 166-14 at 5, 166-19 at 5, 166-22 at 5, 166-15, 166-20, and 166-23); *see also* DX 50, attached as Ex. 18 hereto (WAP Ledgers of Payments Received for Tom Rider); ECF No. 599-36, ¶ 16 (Lovvorn "drafted and signed the cover letters to accompany the issued checks"); Ex. 6 at 66-67 (Markarian) (the payments were processed by HSUS's accounting department). At least one of the checks was even signed by Wayne Pacelle, HSUS's President and CEO. ECF No. 166-39, attached hereto as Ex. 19, (HSUS Check to WAP (08-03-06)). HSUS acknowledged these as its own payments, reporting them on its IRS Form 990s as "grants" to WAP. Ex. 5 (HSUS 2005 IRS Form 990) at 2; Ex. 26 (HSUS 2006 IRS Form 990) at 60. Indeed, HSUS's involvement in this case was so pervasive and the distinction between the two entities so vague that the Court referred to them as "FFA/HSUS" in its December 30, 2009 opinion. ECF No. 559 at 30 n.15.

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[22] It was not just HSUS's legal department, but also its public relations and fundraising departments that were involved in this litigation. Ex. 15 (Markarian Dep.) at 30 ("staff members of [HSUS's litigation] section do provide some support to the litigation [of the ESA Action]"); *id.* at 33 ("[O]ur public relations department at the Humane Society of the United States has done some work to – to educate the public about the fund litigation and some of our fundraising departments have helped to try to raise funds for the litigation [of the ESA Action]").

Here, not only did HSUS take over FFA generally – its management, its employees, its offices, its equipment, its money, its intellectual property, its donor lists and donations, etc., and referred to the combination as a "merger" both internally and publically – it also specifically took over FFA's role in this litigation. HSUS clearly wanted to be part of this case when it thought things were going well for the plaintiffs – it claimed it as one of its own cases on its website, its lawyers were counsel of record and were actively involved in the case, it used the case to raise money, and it even perpetrated the scheme by making some of the Rider payments. HSUS cannot do an about-face and disclaim all connection to the case now that things have gone badly for plaintiffs. HSUS voluntarily chose to assume FFA's interest in this litigation. It cannot now escape the consequences of that choice.

B. Should the Court Determine That There are Issues of Material Fact Related to Whether the Asset Acquisition Agreement Constituted a De Facto Merger, FEI Requests Discovery and an Evidentiary Hearing

Given the procedural posture of this case, many of the facts related to the FFA/HSUS "corporate combination," as discussed above, already have been established and are undisputed. These are not speculative arguments by FEI. They are based on trial exhibits (the Contract and payment documentation); sworn testimony of the FFA President/HSUS Chief Program and Policy Officer (Markarian); information submitted to the IRS and regulatory bodies by FFA and HSUS (Form 990s and Consolidated Financial Statements); sworn declarations of HSUS's in house counsel (Lovvorn and Ockene) and representations the entities have made in their very own pleadings in this case and in other cases filed in this Court.

The Court may rule on this motion by applying the law to these established facts and determining that a *de facto* merger occurred. *See Luxliner*, 13 F.3d at 72 ("To determine whether an entity is a transferee of interest … a district court's mission is one of applying law to facts."). A hearing is not necessary in the absence of disputes about material facts. *Arnold Graphics*, 775

F.2d at 40-43 (holding that it was not error for district court to grant a Rule 25(c) motion without a hearing where there was no genuine dispute about the facts demonstrating that a *de facto* merger occurred); *Greater Potater Harborplace, Inc.*, 1991 U.S. App. LEXIS 11015, at *15 (district court did not err in joining defendant on the Rule 25(c) papers where the challenges "were not genuine, material or relevant."). While HSUS "may disagree sharply over the legal significance of the facts," it cannot "disagree over the facts themselves," making resolution of this motion appropriate without a hearing. *Beane*, 2011 U.S. Dist. LEXIS 8872, at *18.

To the extent the Court finds that any material factual questions exist, however, FEI requests discovery into, and an evidentiary hearing regarding, the relationship between FFA and HSUS to establish the applicability of the successor in interest exceptions. *See Nazario-Lugo*, 2013 U.S. Dist. LEXIS 24121, at *2, 5 (noting that the court had ordered discovery, including depositions, after filing of Rule 25(c) motion); *Luxliner*, 13 F.3d at 72-73 (where there are issues of material fact, an evidentiary hearing should be held prior to ruling on a Rule 25(c) motion).

CONCLUSION

For the reasons set forth herein, FEI's motion should be granted and HSUS should be joined as a party plaintiff.

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Respectfully submitted,

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